No. 346

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ARCHIE SHELP AND GEORGE CLEVELAND,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Supplemental Brief of Defendant in Error.

In Error to the United States District Court for the District of Alaska.

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ARCHIE SHELP AND GEORGE CLEVELAND,
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vs.
THE UNITED STATES OF AMERICA,
Defendant in Error

Supplemental Brief of Defendant in Error.

Permission is respectfully asked of the Court to file a few observations, hastily reduced to the form of a brief, respecting this case, which do not appear to have been suggested in the brief heretofore filed by the U. S. Attorney for Alaska, and which are deemed pertinent here.

It is true that, as contended by the plaintiffs in error, a writ of error addresses itself to the record, and therefore when the record itself discloses the ground for reversal, a bill of exceptions is unnecessary. The case cited by plaintiffs, however, Rail-

way Co. *vs.* Drake, *et al.*, 72 F. R., 945. is itself based upon the decision in the case of Storm *et al.*, *vs.* U. S, 94 U. S. 76, which requires that objection should be regularly made, and due exception taken in the Court below to an alleged error, in order to bring the same before the Appellate Court. The authority cited by counsel does not dispense with such necessary prerequisites; it merely dispenses with a bill of exceptions in certain cases. In the case at bar there was no objection made, or exception taken by the plaintiff Shelp for the alleged failure of the Court to arraign him, or cause his plea to be entered. It is not even assigned as error; and it is therefore respectfully submitted that it cannot now be brought to the attention of this Court.

Moreover, there is no statement in the record that the plaintiff Shelp was not arraigned and his plea not entered. *Non constat*, but, that from all the record says, the plaintiff Shelp, was arraigned and pleaded not guilty. It is stated in the bill of exceptions (p. 22), that "*the issue* " *joined in the above stated cause between the said parties* " (referring to both plaintiffs here) came on to be tried " * * * the defendants (were represented) by cer- " tain counsel." How could issue have been joined between the Government and Shelp without a plea from the latter? Both of the defendants are tried, plaintiff Shelp, among others, taking the witness stand in his defense. Not one word of protest then came from him that his trial was irregular or void in the respect indicated. It is not alleged as one of the grounds of a motion for a new trial, or in arrest of

judgment, or as an assignment of error. Can it be possible that he can now be heard to protest for the first time that he was not arraigned? He voluntarily submitted himself to the Court's jurisdiction, and had the advantage of a trial in the manner provided by law.

U. S. R. S., Sec. 1032, provides that "when the "party pleads not guilty, or such plea is entered as "aforesaid" (*i. e.*, where he stands mute upon his arraignment), "the cause *shall be deemed at issue*, and "shall, without further form or ceremony, be tried by "jury." As before observed, the record discloses, at least inferentially, that issue was joined between the parties. The Court will presume that the proceedings in the Court below were regular unless the contrary clearly appears. The contrary does not clearly appear. It will therefore presume, we submit, in a case not involving an infamous punishment, that the issue was legally joined, *i. e.*, by plea of not guilty from the plaintiff Shelp; and the Court will not permit the record to be contradicted by an inference that there was no such plea entered by Shelp, because it is not specifically set forth in the printed transcript. Suppose, however, the plaintiff Shelp, was not arraigned. The failure to do so on the part of the Government would, it is respectfully submitted, be cured by Section 1025, U. S. R. S. The case quoted upon this point by plaintiffs' counsel, Crain *vs.* U. S., 162 U. S., 625, is not here applicable. That case involved an infamous offense, and the Court was particularly careful to limit its inquiry to cases of that

nature in discussing the absence of any arraignment. The case at bar does not involve an infamous offense; but concerns an offense of the class commonly designated misdemeanors, punishable by a maximum imprisonment of six months,

23 U. S., Stats. at Large, at page 28.
U. S. R. S., Section 1955;

and many formalities deemed vital in the prosecution of the former class of crimes can be waived by the defendant in the trial Court in a prosecution for the commission of the latter class of offenses. The plaintiff in error, Cleveland, formally waived arraignment (Trans., p. 4) though it seems his plea was entered; and no objection has been made by counsel to this waiver, nor has the suggestion been made that the trial was irregular or void as to him. Why can an objection be now successfully raised that the other plaintiff in error, Shelp, was not legally tried, because he saw fit to remain mute, and, by his submission to trial without protest, virtually waive arraignment also? Three justices dissented from the opinion of the majority of the Court in the case just referred to; and had the grade of the offense involved in that case been lower than infamous, as in the present case, it is fair to presume that the Supreme Court would have held that the failure of the plaintiff in error, Shelp, to more seasonably object to the defect, if found to exist, and his acquiescence and participation in his subsequent trial constituted a waiver of arraignment, of which he could now take

no advantage on appeal, and which was cured by Section 1025, *supra*.

The plaintiff's first assignment of error does not, we submit, merit attention.

General Laws of Oregon, page 348, paragraph 61.

U. S. R. S , Section 1033.

We note the plaintiff's counsel treats it, as well as the second assignment, with equal insignificance.

We pass from the second assignment, as equally undeserving of comment, to the third. The objection to the sufficiency of the indictment to charge the commission by the plaintiffs in error of a crime against the United States, was raised for the first time by motion in arrest of judgment. It will be noted that under Section 1025, *supra*, "any defect or imperfec- "tion in matter of form only, which shall not tend to "the prejudice of the defendant," does not affect the trial or judgment of such defendant.

Wharton's Criminal pleading and practice, Section 760, states that "errors as to form, not going to the "description of the offense, which might have been "taken advantage of at a previous stage, are not suffi- "cient to cause arrest (of) judgment;" and the section closes with a quotation from an English decision of Blackburn, J., in 1873: "Where an averment which "is necessary to support a particular part of the "pleading has been imperfectly stated, and a verdict "on an issue involving that averment is found, and "it appears to the Court, after verdict, that unless

"this averment were true the verdict could not be "sustained, in such case the verdict cures the defec- "tive averment, which might have been bad on de- "murrer."

Let us concede, for the moment, that the indictment is defective in not specifically alleging that the plaintiffs in error were not within the exception mentioned in the Act,

> 23 Stats., at Lat. p. 28,
> U. S. R. S., Sec. 1955,

instead of averring that plaintiffs in error "unlawfully and wilfully" sold the liquor, "without having first "complied with the law concerning the sale of intoxi- "cating liquors in the District of Alaska." The indictment was not attacked by demurrer or motion to quash; the plaintiffs were tried thereon, and convicted. The jury must have found that the alleged defective averments, hereinabove quoted, were true, in order to reach a verdict of guilty, and the verdict could not be sustained unless these averments were found to be true.

It thus becomes apparent that the alleged defect has been cured by the verdict.

But is the indictment defective in this particular? We submit it is not. A former indictment, framed under the law in question, averring that the defendant sold certain liquors in Alaska, contrary to the Statutes of the United States, without negativing

the exception contained in the Act, was construed by Judge Dawson in

U. S. *vs.* Nelson, 29 F. R., 202,

and by Judge Deady, on writ of error, in

U. S. *vs.* Nelson, 30 F. R., 112,

and such indictment was held good. The objection thereto was taken more strongly there than here, because it was raised before trial by demurrer; and the law applicable to exceptions contained in Acts denouncing offenses is there discussed *in extenso.* These cases are referred to with approval in later Federal decisions. The indictment in the case at bar was probably framed with these decisions before the pleader; and we unite with counsel for plaintiffs in error in recalling to the Court's attention the adage "*via antiqua via est tuta*," and agree with him in his quotation (p. 13) that "neither sound reason nor pub-" lic policy justifies any departure from settled forms applicable in criminal prosecutions." See further

U. S. *vs.* Cook, 36 F. R., 896.

In the fourth assignment, the plaintiffs in error complain of a portion of the Court's charge to the jury, to which an exception of a general character was taken, not pointing out specifically the matter objected to (Transcript, p. 31). We shall presume that it was taken before the jury retired. It will be noticed by the Court that this portion of the charge contained more than one distinct proposition. It related to (first) the relative credibility of Indians and white men; (second) the probability or lack of proba-

bility that plaintiffs in error committed the offense charged, as indicated by the character of the country, the habits and dispositions of the Indians who lived there, and the quantity of whisky-peddlers in that neighborhood; and (third) the lack of evidence that plaintiffs in error were prospecting or locating claims.

The Court is familiar with the rule of law, that *a general exception to a charge of the Court to the jury, or to any part thereof, will not avail a plaintiff in error where the charge contains distinct propositions, and any one of them is free from objections.*

Anthony *vs.* Louisville & Nashville R. R. Co., 132 U. S., 172.

Foster's Federal Practice, Vol. 2, p. 786.

The objection itself to the charge shows that the plaintiffs' counsel on the trial were endeavoring to embrace more than one proposition in such objection. It was objected (Transcript, p. 31) that "the same "(the charge) is not law, is misleading, tending to "confuse the jury and distract their attention from "the evidence." That portion of the charge relating to the first of the above propositions certainly did not bring forth the objection that it tended "to con- "fuse the jury and distract their attention from the "evidence." The counsel must have framed their objection to meet the second, or possibly the third, proposition *supra*, advanced by the Court, while apparently objecting to the first part of the charge that it was not law.

It certainly requires no argument from us to de-

monstrate that the first part of the charge, without commenting upon the rest of it, is not open to the objection referred to in the cases mentioned in the brief of plaintiff's counsel.

We respectfully submit that this Court cannot inquire into the alleged errors constituting the plaintiff's fifth assignment. *A motion for a new trial is addressed to the trial Court's discretion, and cannot be assigned for error.*

Pittsburg, etc., Ry. Co. *vs.* Heck, 102 U. S., 120.
Wharton's Criminal Pleading and Practice, Secs. 897, 902.

Referring specifically, however, to the various grounds of the motion, it will be observed that no objections were made or exceptions taken by counsel for plaintiffs in error upon the trial, at the time the Court questioned the witness Raymond, or at the time of the alleged misconduct of the United States Attorney for Alaska, or at any other time, respecting these assigned errors, nor does the record show any waiver of such objections or exceptions.

The record must show that the exception was taken at that stage of the trial when its cause arose, i. e., when the ruling or instruction objected to, was given, or it will not be considered by the Appellate Court. That Court is confined to exceptions actually taken at the trial.

Hanna *et al. vs.* Maas, 122 U. S., 24.
Brown *vs.* Clarke, 4 How., 4.
Turner *vs.* Yates, 16 *Id.*, 14.
Barton *vs.* Forsyth, 20 *Id.*, 532.

U. S. *vs.* Breitting, 20 *Id.*, 252.
Phelps *vs.* Meyer, 15 *Id.*, 160.
Hunnicutt *vs.* Peyton, 102 U. S., 333, 354.

The rule in civil and criminal cases is the same.

In the case of Chandler *vs.* Thompson, 30 F. R., 38, 45, it is held that, following the general rule, *any exceptions to the remarks of counsel to the jury should be taken when such remarks were made.* The reason for the rule is too obvious to call for comment.

It is therefore submitted that such charge or remarks cannot be reviewed upon appeal.

In the case of Ball *vs.* U. S., No. 17, Advance Sheets U. S. Sup'm Ct. Opinions, cited by plaintiffs' counsel, a motion for a new trial was referred to by the Court, but it was found to have been based upon an alleged defect in the case not objected to upon the trial, and was therefore dismissed. In the case of U. S. *vs.* Hewecker, 163 U. S., 24, also referred to in counsel's brief, the Court states, in speaking of the repeal of Sections 651 and 697, U. S. R. S., by the Circuit Court of Appeals Act of 1891,

"The general rule was that this Court could not, "upon a certificate of division of opinion, acquire "jurisdiction of questions relating to matters of pure "discretion in the Circuit Court, and therefore that a "certificate on a motion for a new trial would not lie, "but where the questions presented went directly to "the merits of the case it had been held that jurisdic- "tion might be entertained.

U. S. *vs.* Rosenberg, 74 U. S., 7 Wall., 580."

The evidence taken upon the trial on behalf of the prosecution disposes, it seems to us, of the fifth ground of the motion, and we find nothing contained in the sixth ground not heretofore referred to.

No exception appears to have been taken at the time the Court denied the motion of plaintiffs in error for a new trial, nor even at any time afterwards. Nor was such exception waived; but the record is particular to state that exception was taken to the overruling of the motion in arrest of judgment.

It is therefore respectfully submitted that the judgment of the U. S. District Court for the District of Alaska should be affirmed, with costs.

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